APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

No. 63433

In re The Marriage of: Alice Toomey,
Appellant,

vs.

James Michael Toomey,
Respondent.

(Filed July 6, 1982)

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
Honorable Arthur Litz, Judge

This case was transferred from the court of appeals, eastern district, after opinion. This court granted transfer on the husband's application to consider two questions: 1) is a support award that provides for the husband to pay all educational expenses of children and sets a minimum figure unenforceable by execution and thus void; 2) is the fact of a prior marriage between the parties a relevant factor for the trial court to consider in awarding maintenance? Portions of the court of appeals opinion are used here without quotation marks.

The parties had been married for more than twenty years prior to their 1975 divorce in Connecticut.[1] Six children were born during this marriage. They remarried in Missouri on

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[1] The exact date of the original marriage and of the divorce do not appear in the record.

August 31, 1976. Wife filed a petition for dissolution on November 16, 1977, which was amended July 24, 1979. Four of the children were minors at the time of trial in the present action. Judgment was entered July 30, 1979.

At the time of trial, both parties were forty-nine years old. Respondent husband is a licensed physician employed by Washington University at Barnes Hospital and by the City of St. Louis at City Hospital. His gross income is $62,215.46. His monthly take-home pay after deductions which include $19.50 for life insurance and a $329.58 contribution toward a pension plan is $3,323.61. The $329.58 pension contribution is matched by Washington University. Wife is employed part-time as a hostess in a restaurant. Her gross income per month is $396.00 and her take-home pay is $314.00 per month. Husband's ordinary living expenses are approximately $1,509. Wife's estimate of her ordinary living expenses is $1,569. The cost of support for the four children is not clear. Wife listed $2,181 per month which allotted $691 to educational expenses. Husband put educational expenses at $645.53 per month. Wife's estimate of expenses for the children was incorrect in that it included the cost of food for one of the emancipated children who was living with her.

The principal items of property are the family residence and husband's interest in the pension plan. The residence has a value of $140,000 to $170,000, subject to a deed of trust of $40,000. Husband's testimony was that the pension plan was "the California type" (with no explanation as to what he meant), that it shows "a total of $39,849", that it is designed for retirement at age 65 and that "you cannot borrow or take it out." There is nothing in the record as to how the $39,849 figure was arrived at, nor is there a copy of the pension plan or any of its provisions. Husband is indebted to a bank upon a note for $29,400. Other property consists of a checking account, automobiles, and household furnishings.

Wife had been a registered nurse, licensed in Connecticut. She has not practiced her profession for 22 years and her license apparently has expired. She had not been happy in the work and does not intend to follow the profession in the future. The trial court took judicial notice that reciprocity existed between Connecticut and Missouri respecting nurses. Husband testified that refresher courses in nursing are available to persons whose licenses have expired. There was no direct evidence of the status of wife's license, no evidence of availability of positions, and no evidence with respect to the income a nurse could expect to receive. She testified that she was content with her present employment because it allowed her to be with the children who were still at home.

The trial court awarded maintenance to the wife in the sum of $350 per month for a period of five years, which coincides with the youngest child reaching twenty-one. In dividing the property, the court ordered the residence be sold for at lea[illegible]150,000 within six months and the net proceeds divided equally;[1] the pension fund, which had accumulated solely during the second marriage, was set aside to the husband without indicating whether or not it was marital property. The court granted custody of the minor children to wife and made an award of $150 per month as support for each of the four minor children ($600 total). The court made an additional award for support which requires the husband to pay all educational expenses.

Wife appeals the educational expense award which reads in part as follows:

> In addition, Respondent to pay for each child all private school or college tuition and housing costs, said sum to total no less than $665 per month; said sums to be paid directly to the respective educational institutions at such time as Respondent receives statements therefor.

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[1] This order has been stayed during the appeal.

Petitioner wife asserts this order is void because the amount is too indefinite to be enforced by execution and, furthermore, invades the right of the custodial parent to determine how child support is to be allocated.

A trial court has broad discretion and flexibility in fashioning child support payments. The court must make an order that accommodates the needs of the minor children and the ability of the parents to meet those needs. Matheus v. Matheus, 612 S.W.2d 907, 908 (Mo. App. 1981); Allison v. Allison, 540 S.W.2d 635, 636 (Mo. App. 1976). It is apparent from the order that the trial court sought to make this accommodation.

At the time of trial, three of the minor children attended school.[3] The youngest two were in private high schools and one was in college. Dr. Toomey was paying an average of $665 a month for tuition and other expenses. Mrs. Toomey in her testimony indicated that she did not want to change the schools the children were attending, but wanted the money paid directly to her.[4] "I believe in education, but as far as that amount [$665] I think it is overdone." She testified that she wanted the children to get financial aid "because there is so much available now . . . ." Dr. Toomey tesified that he wanted to and was able to pay for the education expenses of any of the children. His testimony indicated that if his children wanted to attend college he would pay all expenses for the colleges his children selected. Also, his employer Washington University will pay up to $2300 annually for tuition for each child at any college or university.

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[3] The other minor child was unemployed and living at home. One of the emancipated children also lived at home.

[4] "Q. And what you are telling the Court is that you would prefer that these payments be made to you in the form of maintenance or alimony, rather than being made in the furtherance of an unnecessary expense for education, is that right?

A. Right."

We do not find that paying the money directly to the respective institutions interferes with the right of the custodial parent to make education decisions. The minimum amount due was for the amount currently paid by Dr. Toomey to the institutions the children were attending. The order to pay the institutions directly is sensible. In this manner, Dr. Toomey can make arrangements with the institutions of the best means to meet the expenses. Furthermore, many items of child support are made directly to a third party and it is within the discretion of the trial court to order accordingly. *E.g.*, In re Lineberry, 9 Bankr. 700, 706 (W.D. Mo. 1981) (payments to orthodontist); Niederkorn v. Niederkorn, 616 S.W.2d 529, 539 (Mo. App. 1981) (payment to medical insurance company); Biggs v. Biggs, 397 S.W.2d 337, 338 (Mo. App. 1965) (payments for private school tuition and camps).

The question remains whether the order is so indefinite as to the amount owed to be unenforceable by execution and thus void. The respondent was ordered to pay all tuition and housing costs, "said sum to total no less than $665 per month." As discussed above, the $665 figure represents the average monthly sum respondent was paying at the time of trial for the children's education.

Loomstein v. Mercantile Trust National Ass'n, 507 S.W.2d 669 (Mo. App. 1974) and Taylor v. Taylor, 367 S.W.2d 58 (Mo. App. 1963), cited by appellant to support this contention, are distinguishable. In *Loomstein*, the provision to be enforced was that the father pay all college expenses without mentioning any sum or method of computation. The court held this to be unenforceable by execution, but added that the provision could well be a contractual obligation. *Taylor* was an attempt to enforce an alimony provision (25% of net income) under the old divorce law. Both cases are of questionable authority after the decision in Bryson v. Bryson, discussed below and Payne v. Payne, No. 63664 (Mo. banc June 8, 1982).

A similar argument was made in Bryson v. Bryson, 624 S.W.2d 92 (Mo. App. 1981). There, the husband was to pay the wife maintenance of $350 a month "or a sum equal to 33 percent of respondent's gross income from wages, whichever was greater." *Id.* at 94. This provision had been part of a separation agreement incorporated into the decree and thus was enforceable as a judgment. The court of appeals held that, although the amount of maintenance award was "facially uncertain," the maintenance provision was valid because the trial court upon motion could determine the amount due. Although *Bryson* involved a maintenance rather than a child support award, the philosophy of the court in finding a method to enforce a decree is applicable here.

The order entered by the court is the *minimum* amount for which Dr. Toomey is obligated. He, of course, can pay more than this amount and from his testimony, it appears that it is his intention to pay more if the educational expenses are greater than $665 a month. If, however, Dr. Toomey fails in his obligation, Mrs. Toomey can bring an action on the judgment for $665 a month. If the expenses for education exceed $665, Mrs. Toomey can move in the trial court for modification of the order and introduce evidence of those increased expenses.

We hold that the order for child support is valid and affirm that portion of the trial court's judgment.

The remaining points on appeal concern whether the trial court erred in the division of property and in the amount of maintenance. For the reasons discussed below, the property division and maintenance awards are reversed and remanded.

This case presents an unusual factual situation. The parties had been married for more than twenty years during which time six children were born. They were divorced in 1975 in Connecticut. The Connecticut divorce decree provided that the family home was to be sold when the youngest child graduated from high school at which time the proceeds were to be divided equally

between the parties. Before the house was sold pursuant to the divorce decree, the parties remarried and moved to Missouri.[5] The Connecticut house was then sold and the proceeds invested in the Missouri home. It is this house that is one of the two principal items of property owned by the parties.

During trial, Mrs. Toomey's attorney attempted to elicit testimony from her that she had been a homemaker during both marriages to illustrate her need for maintenance. Dr. Toomey's objection was promptly sustained with the trial judge commenting, "You are actually at this time, legally only married about three years." This exclusion of testimony was, in the circumstances of this case, error. Once the court determined maintenance should be awarded to the wife, § 452.335.1, RSMo 1978, the court in determining the amount of such award and for what period of time, was to consider "*all* relevant factors," § 452.335.2 (emphasis added), not merely the seven enumerated factors. During trial, other evidence of events occurring during or as a result of the first marriage was introduced without objection when it was relevant. The six children were all born during the first marriage. This was relevant to the issue of child support. The family home was bought with the proceeds from the sale of the Connecticut home. This was relevant to the property division. Dr. Toomey introduced evidence of Mrs. Toomey's nursing license as relevant to her ability to support herself. Where, as here, children were born of the first long-term marriage and the wife was the homemaker, the financial, social and employment status of the parties has been influenced by the totality of their relationship. Under the circumstances before us, evidence of that first marriage is relevant to determine the amount of maintenance and for what period of time.

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[5] We were unable to discover any agency or source that keeps statistics on the incidence of second marriages between the same parties. We have no reliable information on how often this occurs in Missouri or in the United States generally.

In connection with further proceedings in the trial court, we note that one of the major items of property is Dr. Toomey's pension plan through Washington University to which he and his employer each made monthly contributions of over $300 during the second marriage. The trial court set the pension plan aside to Dr. Toomey without making a determination in the record whether the pension is separate or marital property and without any support in the record we can find on which to base a determination either way. This is error because there is no method for determining on the record if the property division is equitable. On rehearing the parties are to furnish the trial court with a more accurate description of the pension plan and the husband's interest therein so the court can determine what sort of property it is and what the division, if any, should be.

That portion of the judgment pertaining to maintenance award and the property disposition is reversed and the cause is remanded for further proceedings in accordance with the foregoing.

Robert E. Seiler, Judge

Donnelly, C.J., Morgan, Higgins and Bardgett, JJ., concur; Rendlen, J., dissents in separate dissenting opinion filed; Welliver, J., dissents and concurs in separate dissenting opinion of Rendlen, J.

SUPREME COURT OF MISSOURI
EN BANC

No. 63433

In re The Marriage of: Alice Toomey,
Appellant,

v.

James Michael Toomey,
Respondent.

Dissenting Opinion
(Filed July 6, 1982)

Married in August of 1976, the parties had lived together 15 months when the wife filed for dissolution on November 16, 1977. Judgment was entered July 30, 1979. During trial, the court noted that the parties had only been "legally ... married about three years" and ruled that evidence concerning appellant-wife's status as a homemaker during their prior marriage was irrelevant to the issue of maintenance. I believe the trial court properly ruled that under § 452.335.1, RSMo 1978, such evidence is not germane to the question of maintenance and accordingly I dissent from the majority's holding that "[u]nder the circumstances before us, evidence of that first marriage is relevant to determine the amount of maintenance and for what period of time." The majority cites no authority for this proposition but bases its conclusion on the notion that the previous conduct (before the 1975 divorce) of the parties, which includes their statuses as may have existed in a prior dissolved marriage, should weigh upon the husband's responsibility to provide maintenance and the wife's corresponding right to receive the same growing out of this marriage of three years' duration and in which merely 15 months passed until the dissolution action was commenced. The prior divorce ter-

minated all rights to aliminy or maintenance for the marriage ending in 1975. The effect of that decree and any obligations for maintenance accruing therefrom ceased with the subsequent marriage in August, 1976. The majority cites no authority and none is suggested demonstrating there can be a tacking on or reaching back to the prior circumstances of divorced parties who later remarry, to provide a relevant factual basis for determining the extent and duration of maintenance arising from dissolution of the second marriage. To justify its conclusion the majority suggests that the fact that children were born of the prior marriage is relevant to the issue of child support renders evidence of the parties' prior status relevant to the current issue of maintenance. This begs the question inasmuch as the continuing duty for child support survives the original divorce as well as the interim period when the parties were not married, the subsequent marriage and the present dissolution. Such is not the case with maintenance (alimony) which arises only from the existence of the marriage beginning in 1976 and terminating in 1979. Similarly the majority recites the fact the proceeds from the sale of the parties' previous Connecticut home was introduced, and concludes this justifies introducing evidence of the "totality of their relationship". It is true that if these proceeds exist as an asset of the parties, their present value (with that of other assets) is relevant to the question of maintenance. However, the readily apparent nexuses connecting (1) the fact six children were born of the prior marriage to the question of child support and (2) the current value of the parties' assets to the issue of maintenance, provide no such link between status in a prior marriage and maintenance stemming from a subsequent dissolution. We may not condemn, as the majority has done, the trial court for properly excluding this evidence as to the parties' circumstances during their first marriage, for such is irrelevant to the issue of maintenance. To the extent it is directed that such evidence be considered on rehearing, I respectfully dissent.

ALBERT L. RENDLEN, Judge

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION ONE

No. 42172

Alice Toomey,
Petitioner-Appellant,

vs.

James Michael Toomey,
Respondent-Respondent.

Appeal from the Circuit Court of St. Louis County
Hon. Arthur Litz, Judge

Opinion Filed: June 16, 1981

Petitioner, wife, appeals from a judgment in an action for dissolution. That part of the decree dissolving the marriage has not been attacked and is therefore final. Wife contends that the court erred in (1) limiting the duration of maintenance, (2) ordering that the family residence be sole within six months and the proceeds equally divided, (3) formulating a decree with respect to the payment of the expense of education for the children which is so vague as to be unenforceable, and (4) awarding inadequate sums for maintenance and for child support. We reverse and remand.

The parties had been married for more than twenty years and were divorced in the State of Connecticut in 1975.[1] They remar-

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[1] The exact date of the original marriage and the date of the divorce do not appear in the record.

ried each other in Missouri on August 31, 1976. Wife filed a petition for dissolution July 24, 1979. Six children were born of the marriage prior to the divorce in Connecticut. Four of the children were minors at the time of the trial in the present action.

Each of the parties is 49 years of age. Respondent, husband, is a licensed physician employed by Washington University at Barnes Hospital and by the City of St. Louis at City Hospital. His gross income is $62,215.46. His monthly take-home pay after deductions which include $19.50 for life insurance and a $329.58 contribution toward a vested pension plan, is $3,300. Wife is employed part-time as a hostess in a restaurant. Her gross income per month is $396.00 and her take-home pay is $314.00 per month. Husband's ordinary living expenses were given as approximately $1,137. Wife's estimate of her ordinary living expenses was $1,569. The cost of support for the four children is not clear. Wife listed $2,181 per month which allotted $691 to educational expenses. Husband stated educational expense as $645.53 per month. Her estimate of expense for the children was incorrect in that it included the cost of food for one of the emancipated children who was living with her.

The marital property of a substantial value consisted of the family residence and husband's interest in a pension plan. The residence has a value of $140,000 to $170,000 subject to deed of trust of $40,000. The Connecticut court had ordered the sale of the residence when the youngest child would have finished high school. However, the parties reconciled and sold the home when they left for Missouri. The monies realized from the sale of that home were used in the purchase of the present residence. Husband's vested interest in the pension plan is valued at $39,849. Husband was indebted to a bank upon a note for $29,400. Other marital property consisted of a checking account, automobile and household furnishings.

Wife had been a registered nurse licensed in the State of Connecticut. She had not practiced her profession for 22 years and her license has apparently expired. She had not been happy in the work and did not intend to follow the profession in the future. The trial court took judicial notice that reciprocity existed between Connecticut and the State of Missouri respecting nurses. Husband testified that refresher courses in nursing were available to persons whose licenses had expired. There was no direct evidence of the status of wife's license, no evidence of availability of position and no evidence with respect to the income a nurse could expect to receive. She testified that she was content with her present employment because it allowed her to be with the children who were still at home.

The trial court awarded maintenance to the wife in the sum of $350 per month for a period of five years. In dividing marital property the court ordered the residence be sold for at least $150,000 within six months and the net proceeds divided equally; husband was awarded the pension fund. The court granted custody of the minor children to wife and made an award of $150 per month as support for each of the four minor children. The court made an additional award for support which reads in part as follows:

> "In addition, Respondent to pay for each child all private school or college tuition and housing costs, said sum to total no less than $665 per month; said sums to be paid directly to the respective educational institutions at such time as Respondent receives statements therefor."

Because we must reverse and remand, primarily because of the award with respect to educational expenses, we shall discuss that issue first.

It is evident that the trial court attempted to fashion a judgment that would accomodate the problem caused by spiraling

educational costs. The judgment however, is not for $665, but requires husband to pay "all private school or college tuition and housing costs." It has been held in this state that a judgment calling for the payment of money must be definite in amount so as to be capable of collection by way of execution. A judgment that is indefinite is void and unenforceable. Loomstein v. Mercantile Trust National Ass'n., 507 S.W.2d 669 (Mo. App. 1974). See also Taylor v. Taylor, 367 S.W.2d 58 (Mo. App. 1963) and the cases collected therein. The provision by the trial court for a minimum payment does not cure the defect of the judgment. The court clearly intended to provide for all of the educational needs of the four children. In spite of the well-intentioned desire of the trial court to make a final disposition of this litigation we must reverse the judgment and remand for further proceedings.

In view of the fact that the various aspects of the dissolution decree are interdependent, we deem it advisable to remand the cause and permit additional evidence to be taken with respect to the nature and extent of marital property, maintenance and child support. See V.M. v. L.M., 526 S.W.2d 947 (Mo. App. 1975).

One issue obliquely referred to by the parties in the briefs is the question of the duration of the marriage. No specific findings of fact were made on the issue yet it appears from comments in the trial that the court, for purposes of maintenance, considered the marriage to have been one of three years duration. This issue has not been determined by the courts of this state and because the case is to be reheard we shall address the issue.

We are of the opinion that in the case of a marriage followed by a divorce and then a remarriage between the same persons, the total number of years of marriage between the parties should be considered. Where, as here, children were born of the

marriage and the wife was the homemaker, the financial, social and employment status of the parties has been influenced by the totality of their relationship. Thus the obligations of both parties carry over into the second dissolution of the marriage.

The issue has been tangentially considered in other jurisdictions in situations similar to that existing in this case. The court in Kantaris v. Kantaris, 169 N.W.2d 824, (Iowa 1969) said:

> "This is not the usual case of a marriage of short duration. The fact that this divorce follows a remarriage of these parties is an important circumstance existing at the time of the second divorce. Plaintiff has three young daughters to look after. This is a circumstance which affects her opportunity for employment, ability to accumulate property and the possibility of remarriage and makes a larger award of property and alimony proper than would be approved in the usual case." *Id.* at 831.

In Whittington v. Whittington, 48 Ala. App. 680, 267 So.2d 472 (1972) where the parties had been married for 29 years, divorced for seven months and remarried for four months the court commented that "the parties were married for twenty-nine years." *Id.* at 476. See also In re Marriage of Reilly, 577 P.2d 840 (Montana 1978) and Davis v. Davis, 59 Cal. Rptr. 788, 437 P.2d 502 (banc 1968).

We are of the opinion that remarriage between the same parties after a divorce is a continuation of the marriage so that "the duration of the marriage" as one of the elements in determining the amount of maintenance, § 452.355.1(4) RSMo 1978, encompasses all of the time during which the parties were husband and wife.

On remand, the parties may also present the court with a more accurate discription of husband's interest in the pension plan.

The cause is remanded to the trial court for further proceeding with respect to child support, maintenance and the division of the marital property.

/s/ JOSEPH G. STEWART, Judge

/s/ ALBERT J. STEPHAN, Jr. Presiding Judge Concurs

/s/ ROBERT G. DOWD Judge Concurs

APPENDIX C

Circuit Court Of St. Louis County
State of Missouri
AMENDED JUDGMENT

IN RE THE MARRIAGE OF:

Alice Toomey — Cause No. 401979

and — Division No. 5

Dr. James Michael Toomey — October 4, 1979

☐ Joint Petitioner
☒ Respondent

Appearances

☒ Petitioner(s) appear(s) in person and by attorney

☐ Respondent remains in default

☒ Respondent appears by attorney

☐ Respondent fails to appear

☒ Respondent appears in person

☒ The Court finds that there is no reasonable likelihood the marriage can be preserved and is therefore irretrievably broken

☒ Decree of Dissolution granted
☐ Decree of Legal Separation granted

☐ Restoration of (former) (maiden)* name of _____ granted

Custody of the minor children awarded to Petitioner-Wife (full name and birthdate of each child)

Maura Toomey	4/16/59
Catherine Toomey	6/24/60
Ann Toomey	12/10/63
David Toomey	5/14/64

Residence of said children shall not be changed from the state of Missouri without prior specific authorization of the Court.

Visitation rights: none

Temporary custody: Reasonable upon reasonable notice

Child Support: (Respondent)* ordered to pay to (Petitioner) (name of each child and amount for each child)

Maura, $150.00 per month, Catherine $150.00 per month, Ann $150.00 per month, David $150.00 per month

In addition, Respondent to pay for each child all private school or college tuition and housing costs, said sum to total no less than $665 per month; said sums to be paid directly to the respective educational institutions at such time as Respondent receives statements therefor. Further, Respondent to pay all medical and hospital expenses for each child in excess of $100 per child per year.

Maintenance: None to Respondent. To Petitioner: $350.00 per month for five years or until she re-marries or dies.

Other orders: Marital Property to Pet-Wife: 1979 Ford Auto and she is to pay off existing mortgage thereon; furniture and furnishings in family home at 1839 Rustic Oak, St. Louis County, Mo.

To Respondent Husband: 1976 Corvette, 1974 Subaru; cash in Pioneer Bank Acct; furniture and furnishings in his apartment; all interest in Teacher Insurance & Annuity Ass'n. at Washington University College Retirement Equity Fund.

Family home known as 1839 Rustic Oak, St. Louis County, Mo. is ordered to be sold by the parties. Same to be listed with Real Estate agent within next 30 days and sold within 6 months. If parties cannot agree on an agent, each party to select one and they jointly handle sale. The minimum sale price for said home shall be $150,000. From net proceeds of the sale proceeds to be equally divided between Petitioner and Respondent.

Respondent shall pay all mortgage payments and reasonable utility bills respecting said family home for a period of six months from the date hereof or until said home is sold, whichever shall first occur.

☒ The (Parties) represent to the Court that no other marital property or separate property remains to be apportioned by the Court.

☒ (Respondent)* is ordered to pay to Petitioner's Atty, Stuart Cofman the sum of $1200.00 as and for attorneys fees and the sum of $100.80 as and for expenses.

Costs taxed against (Respondent) (Husband)

☐ Separation Agreement filed marked exhibit _____ and found to be conscionable.

☐ Separation Agreement to be incorporated in and made part of decree.

☐ Parties are ordered to perform the terms thereof.

☐ Circuit Clerk ordered to file for record a certified copy of the decree in the office of the Recorder of Deeds in the County of _____ State of _____ where the real estate is situated.

Charles Seigel Signature of Respondent's Attorney	Stuart Cofman Signature of Petitioner's Attorney
722 Chestnut St. Address	314 N. Broadway Address
63101 Zip	63102 Zip
_____ Phone	_____ Phone

Extra copy requested to be mailed to: _____
(Name) (Address)

*Strike words not applicable

SO ORDERED /s/ Arthur Litz
Judge